

**Appeal No. 2007AP1670**

**Cir. Ct. No. 2005CV171**

**WISCONSIN COURT OF APPEALS  
DISTRICT III**

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**HENRY J. NAULT, JR., INDIVIDUALLY AND  
LISA G. NAULT, INDIVIDUALLY, AND AS SPECIAL  
ADMINISTRATOR OF THE ESTATE OF JARON J.  
NAULT, DECEASED,**

**PLAINTIFFS-APPELLANTS,**

**JOHN ALDEN LIFE INSURANCE COMPANY,  
ASSURANT HEALTH, PARENT COMPANY,**

**NOMINAL-PLAINTIFF,**

**V.**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT,**

**WILLIAM H. SIMONSON, DAIRYLAND  
INSURANCE COMPANY AND FOREMOST  
INSURANCE COMPANY,**

**DEFENDANTS.**

**FILED**

**FEB 19, 2008**

David R. Schanker  
Clerk of Supreme Court

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Hoover, P.J., Peterson and Brunner, JJ.

We certify this appeal to the Wisconsin Supreme Court to decide five issues relating to construction of an umbrella insurance policy and the application of WIS. STAT. § 632.32(4m) to the policy:

- (1) Does WIS. STAT. § 632.32(4m) require an insurer to offer underinsured motorist (UIM) coverage for an umbrella policy;
- (2) Must an insurance company writing an umbrella policy notify the insured of the availability of UIM coverage if the company does not offer UIM coverage for umbrella policies;
- (3) Does WIS. STAT. § 632.32(4m) apply to an umbrella policy that is a part of a combined homeowners and automobile policy where the automobile portion does provide UIM coverage;
- (4) Whether reformation of the policy is the appropriate remedy if WIS. STAT. § 632.32(4m) applies; and
- (5) Whether the West Bend umbrella policy is contextually ambiguous.

Jaron Nault was fatally injured in a traffic accident. After settling with other applicable insurers, his parents and his estate sought UIM coverage under their West Bend Mutual Insurance policy. The combined policy has a single policy number, but provides motor vehicle, homeowners and umbrella coverage. The motor vehicle and umbrella policies have separate declarations pages reflecting separate premiums for these coverages. The motor vehicle portion of policy contains a UIM endorsement, but the umbrella portion of policy does not. West Bend stopped offering UIM coverage to new customers as of January 1, 2004, before the Naults purchased their policy. Exclusion 17 in the umbrella portion excludes UIM coverage “unless this coverage form is endorsed to provide such coverage.” There was no such endorsement here and, due to West Bend’s discontinuation of UIM coverage for umbrella policies, none was available.

The Naults argue that WIS. STAT. § 632.32(4m) required West Bend to offer UIM coverage to new insureds. The statute provides, in relevant part:

An insurer writing policies that insure with respect to a motor vehicle registered or principally garaged in this State

against loss resulting from liability ... shall provide to one insured under each such insurance policy ... that is written by the insurer and that does not include underinsured motorist coverage written notice of the availability of underinsured motorist coverage, including a brief description of the coverage.

The Naults argue that “notice of the availability” of UIM coverage suggests legislative intent that UIM coverage be offered under all liability policies that insure a motor vehicle. West Bend argues that if this language mandated that all auto insurers offer UIM coverage, the language would have been much more direct, comparable to the language mandating uninsured motorist coverage. *See* WIS. STAT. § 632.32(4). In ***Rebernick v. Wausau Gen. Ins. Co.***, 2006 WI 27, 289 Wis. 2d 324, 711 N.W.2d 621, the court held that, if a carrier offers UIM coverage in an umbrella policy, the notice requirements of WIS. STAT. § 632.32(4m) apply. The court did not determine whether the statute requires insurers to offer UIM coverage as part of an umbrella policy because that issue was not presented in ***Rebernick***. *See id.*, ¶11 n.5. We submit that it is appropriate for the supreme court to decide that issue in this case.

The Naults next argue that West Bend was required to notify them of the availability of UIM coverage even if West Bend did not offer that coverage. This issue was not addressed in ***Rebernick***, because the insurer in that case did sell UIM coverage with its umbrella policy. The court noted that the central purpose of WIS. STAT. § 632.32(4m) is to “ensure that all insureds know of the availability of UIM coverage. Put another way, the legislature has determined that where UIM coverage is available, insureds should know about it.” ***Id.***, ¶25. We submit that it is appropriate for the supreme court to clarify whether “notice of availability” applies when UIM coverage is not available from this insurer for umbrella policies. We also question whether an insurer can refuse to provide UIM

coverage to some customers and thereby avoid any obligation to educate those insureds about UIM coverage.

West Bend argues that, because there was only one policy number, the umbrella policy is not a separate policy. WISCONSIN STAT. § 632.32(4m) only mandates an insurer to notify the insured of UIM coverage if the policy does not provide UIM coverage. According to West Bend, this means no separate notification was necessary for the umbrella coverage. The Naults respond that West Bend has already stipulated that three separate policies are included under one policy number. They argue that combining three separate policies to avoid application of § 632.32(4m) would be confusing to a policyholder, particularly when the motor vehicle and umbrella policies have separate declarations pages reflecting separate premiums. They also argue that they purchased the umbrella policy separately, six months following their purchase of the motor vehicle coverage. Therefore, the motor vehicle and umbrella coverages should be deemed separate policies, each subject to § 632.32(4m) regardless of whether West Bend chose to assign the same policy number to the various policies. In *Rebernick*, separate policies were purchased seven days apart, and were not treated as the same policy. *Id.*, ¶35. We submit it is appropriate for the supreme court to clarify whether the duties imposed by § 632.32(4m) are satisfied by providing UIM coverage in the motor vehicle portion or policy but not in the umbrella portion or policy when the coverages are assigned the same policy number by the insurer.

If West Bend violated WIS. STAT. § 632.32(4m), the Naults argue that reformation of the policy to provide UIM coverage is the appropriate remedy. In *Stone v. Acuity*, 2006 WI App 205, ¶8, 296 Wis. 2d 240, 723 N.W.2d 766, this court held that reformation of the policy is the appropriate remedy. A petition for review of that decision was granted. *Stone v. Acuity*, 2007 WI 59, *review granted*,

(WI Jan. 11, 2007) (No. 2005AP1629). We submit that it is appropriate for the supreme court to review that issue in the context of this case as well.

Finally, the Naults argue that the West Bend policy is contextually ambiguous. Exclusion 17 states that West Bend will not cover any claims made under any UIM motorist coverage “unless this coverage form is endorsed to provide such coverage.” The Naults argue that this exclusion intrinsically creates ambiguity in light of West Bend’s failure to offer a UIM endorsement to its umbrella policies. The exclusion advises insureds that they may purchase an endorsement even though they cannot actually do so. West Bend responds that the policy is unambiguous. Language regarding the endorsement was placed in the policy for customers who purchased umbrella coverage policies before West Bend discontinued offering UIM coverage on umbrella policies.

This appeal presents issues that were not addressed in *Rebernick*, other issues of first impression in this state, and an issue currently before the supreme court in another case. We submit that resolution of these issues by the supreme court would be appropriate to clarify the appropriate construction of West Bend’s policy, the applicability of WIS. STAT. § 632.32(4m), and the appropriate remedy.

